In the Matter of:

City of Alexandria
v.
Purdue Pharma

Hearing

January 18, 2019

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

(Alexandria Division)

CITY OF ALEXANDRIA,

Plaintiff,

v. Case No. 1:18cv1536

PURDUE PHARMA, et al,

Defendant.

Alexandria, Virginia

January 18, 2019

The above-entitled matter came on to be heard before the HONORABLE CLAUDE M. HILTON, Judge in and for the United States District Court for the Eastern District of Virginia, located at 401 Courthouse Square, Alexandria, Virginia, commencing at 10:24 a.m., when were present on behalf of the respective parties:

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P R O C E E D I N G S

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THE CLERK: Civil Action 2018-1536, City of Alexandria versus UnitedHealth Group Incorporated, et al.

Counsel, please note your appearance for the record.

MR. SPIVEY: Your Honor, I'm Ed Spivey from the firm of Kaufman Canoles, here on behalf of the City of Alexandria.

THE COURT: All right. Good morning.

MR. CONRAD: Your Honor, Johan Conrad, also from Kaufman Canoles, here on behalf of the City of Alexandria.

MR. SHARP: Your Honor, Kevin Sharp with the law firm of Sanford, Heisler, and Sharp. I'm here on behalf of the City of Alexandria.

MR. MILLER: Good morning, Your Honor. Andrew Miller from the law firm Sanford, Heisler, and Sharp, also on behalf of the City of Alexandria.

MR. BROOKS: Good morning, Your Honor. Ross Brooks, from Sanford, Heisler, and Sharp, on

behalf of City of Alexandria.

MR. MORRIS: Good morning, Your Honor. Grant Morris on behalf of Sanford, Heisler, City of Alexandria.

MR. BROUGHTON: Good morning, Your Honor. Turner Broughton from Williams Mullen, here on behalf of the Optium defendants and UnitedHealth.

MS. CHEMERINSKY: Good morning, Your Honor. My name is Kim Chemerinsky at the law firm of Alston & Bird, here on behalf of defendants Optium and UnitedHealth Group.

MR. JORDAN: Good morning, Your Honor. Bill Jordan, also from Alston & Bird, for Optium and UnitedHealth Group.

MS. ROSADO: Good morning, Your Honor. Roxanne Rosado on behalf of Express Scripts, Inc., and Express Holdings, Inc.

MR. MENCHEL: Good morning, Your Honor. Matthew Menchel of Kobre & Kim on behalf of the Express Scripts defendants.

MS. RIVIERE: Good morning, Your Honor. Adriana Riviere, Kobre & Kim, on behalf of the

Express Scripts defendants.

MS. PARK: Good morning, Your Honor. My name is Julian Park, on behalf of Express Scripts.

MR. MASSIE: May it please the Court, Wade Massie on behalf of Purdue Pharma, LP, Purdue Pharma, Inc., and Purdue Frederick Company. With me is Mr. Cory Ward who has a motion pending pro hac vice.

THE COURT: All right. That motion is granted.

Do I have all parties now?

MR. MASSIE: Yes, sir.

THE COURT: All right. Whose motion is it? Who wants to go first?

MR. BROUGHTON: Your Honor, there are multiple -- this is Turner Broughton, Your Honor, and I'm local counsel for Alston Bird. There are multiple motions pending. There's a motion to remand as well as a motion to stay, and so we would be at Your Honor's pleasure in terms of what Your Honor would like to hear first.

THE COURT: It doesn't matter. Whoever

wants to go first.

MR. CONRAD: Your Honor, from the plaintiff's perspective, we think the order that they were filed, the motion to remand was filed first and the motion to stay was filed next; so I think that's the natural order.

THE COURT: All right.

MR. CONRAD: If that's okay with you.

THE COURT: That's fine with me.

MR. CONRAD: Your Honor, may it please the Court, I'm Johan Conrad. As I just said, I'm from Kaufman & Canoles. I'm here on behalf of the City of Alexandria and I'm going to address the motion to remand.

Your Honor, there are three basic categories of jurisdiction that are at issue in the motion to remand, basically the categories of jurisdiction that the defendants are relying on. And so I'm going to address those essentially in order in which they were addressed in the briefing and try to go through them relatively succinctly.

As you know, Your Honor, this case was

first filed in the city -- excuse me, in Alexandria Circuit Court on behalf of the City of Alexandria against a number of defendants who are part of the pharmaceutical opioid chain of distribution; everything from the manufacturers of the opioids, to the distributors of the opioids, to pharmaceutical benefit managers who help work in the chain of distribution to deliver those opioids to end users.

The counts in the claims in the complaint filed by the City of Alexandria are all brought under Virginia state law. They range from statutory public nuisance claims, which are only available to localities and government entities in the Commonwealth of Virginia, to common-law negligence claims to conspiracy claims. Every single claim -- Virginia Consumer Protection Act claim, they all arise under Virginia law.

There are no federal claims in the complaint. The complaint is lengthy, it contains several hundred allegations. It contains allegations against a number of defendants, at least one of which is a Virginia resident defendant.

There's no dispute that there is not diversity as to that defendant. And I'll talk about some issues with that defendant -- with the defendants here in a few minutes.

Your Honor, the -- the three bases on which the removal has occurred, first is under something called Class Action Fairness Act, CAFA. The second is federal question jurisdiction under a -- what's been deemed a special and small category of federal question jurisdiction recognized in Supreme Court cases like Gunn v. Minton and also addressed in the Fourth Circuit in a case Flying Pigs.

The last category has to do with diversity jurisdiction, and that involves a couple of prongs. There's a piece of that in which there's an argument for fraudulent joinder and then there's another piece of that that argues for Rule 21 severance. So with Your Honor's indulgence, I'm going to start with the Class Action Fairness Act piece of this case.

Before I do, I want to make clear that there were some proceedings going on in the Virginia

state courts when this case was removed. As you may know from some of the briefing, the plaintiffs had petitioned the Supreme Court of Virginia under the Multiple Claimant Litigation Act to consolidate similar actions in one particular Circuit Court.

The Supreme Court of Virginia had already issued an order appointing a three-judge panel of three Circuit Court judges to hold a hearing and any necessary briefing on the issue of consolidation, and they were working to set a hearing. In fact, there was an actual hearing date being -- being circulated for -- for a possible hearing in January at the time that these cases were removed or the time this case was removed.

So, Your Honor, with respect to the Class Action Fairness Act, there are actually two Fourth Circuit opinions that provide clear guidance on this issue within the Fourth Circuit. There is also a Second Circuit opinion that provides somewhat less clear guidance because it's not as relevant here in the Fourth Circuit. And then there's actually a district court opinion that has come directly out of

the opioid litigation context that addresses the Class Action Fairness Act jurisdiction argument. All of those decisions have rejected the application of CAFA in a context like this one.

And I think that the most appropriate decision or the most on-point decision for purposes of this Court is the Fourth Circuit's decision in a case called West Virginia v. CVS Pharmacy.

Now, remember, Judge, there are -- there are two bases under the Class Action Fairness Act by which Congress has deemed there could be -- there could be federal question -- or excuse me, federal jurisdiction. The first is under a class action, second is under what they call a mass action. And mass action involves we have multiple individual cases, under 100 individual cases that are consolidated. And so under that mass action, you could have CAFA jurisdiction.

The only category that the defendants have raised here is the class action category. They have not -- they specifically decline to rely on the mass action part. Okay.

So West Virginia v. CVS pharmacy is a Fourth Circuit case that specifically deals with class action jurisdiction in the context of a lawsuit brought by a government entity, in that case the Attorney General for the state of West Virginia.

The feature of class action jurisdiction or CAFA that matters most for purposes of us here today is that to have jurisdiction or CAFA, you either have to file under Rule 23 of the Federal Rules of Civil Procedure or you have to file under what is in the statute called a similar statute -- state statute or rule of judicial procedure authorizing an action to be brought by one or more represented persons as a class action.

So the threshold question here is whether or not the complaint before you filed by the City of Alexandria was brought under a similar state statute or rule of judicial procedure similar to Rule 23.

And so in this West Virginia case, what the Fourth Circuit said was, okay, what does it mean for a state statute or rule of judicial procedure to be similar to Federal Rule 23. And in that case the

Fourth Circuit said while a similar state statute or rule does not need to contain all of the conditions and administrative aspects of Rule 23, it must at a minimum provide a procedure by which a member of a class whose claim is typical of all members of the class can bring the action not only on his own behalf but also on behalf of all others in the class such that it wouldn't be unfair to bind everyone to the judgment that's entered.

And then the Fourth Circuit went on to explain what that meant even more and to distinguish the case in front of it in ways that I think are directly applicable to this particular case. And one of the things that the Fourth Circuit said was the reason that the case brought by the state of West Virginia could not be deemed a class action is that for a representative suit to be a class action, the representative party had to be a part of the class and possess the same interest and suffer the same injury as the class members.

And the Court said here -- and remember -- I should probably back up and set the stage a little

bit. The reasons the defendants argue that this somehow looks like a class action is that they are claiming that the damages are -- and the -- and the claim is actually being brought on behalf of the residents of the city of Alexandria as opposed to on behalf of the city itself. And so somehow the citizens of the city of Alexandria should be deemed, quote-unquote, real parties in interest. Okay.

And so what the Fourth Circuit said is a case like this can't be a class action because in order to be -- in order to be similar to a class action, the representative party has to be a part of the class. In other words, it would have to be another resident of the city. And in the West Virginia case, the Fourth Circuit said the attorney general's claim on behalf of the state of West Virginia does not require the state to be a member of the class, it does not require the state to suffer the same injury as the class member or to have a claim typical of each class member's claim.

So here the City of Alexandria is not a member of the, quote-unquote, class that the

defendants would claim exists here. And the City of Alexandria is not bringing this claim in a representative capacity on behalf of the other or the residents of the city.

Now, what the defendants have done is they have tried to cherry pick certain allegations in the complaint that reference generally injury to particular residents and citizens. In other words, there are some paragraphs in the complaint -- the complaint is several hundred paragraphs long, but there are a couple that talk about the fact that some of the -- some of the residents have been injured or been subject to bad acts by the defendants.

What -- but the case is not brought underneath any state statute or rule of judicial procedure that looks like Rule 23. And, in fact, the Commonwealth of Virginia does not even have a state statute rule of judicial procedure that would allow a representative class action. In fact, we cited to the Supreme Court of Virginia case or recent Supreme Court of Virginia case in our briefs

that specifically says Virginia does not recognize these kinds of representative actions. So you can't even bring in Virginia the kind of case that would be similar to Rule 23 for purposes of CAFA jurisdiction.

So there are a multitude of reasons why this claim is not a class action under CAFA. It's been rejected. The only time it's been addressed in the Fourth Circuit with respect to government entity plaintiffs, it's been rejected by a District Court in the opioid context. It's been rejected by the Second Circuit in another case that involved opioids in the Commonwealth of Kentucky. So there's frankly no basis for this Court to conclude that there is any federal jurisdiction under the Class Action Fairness Act.

So, Your Honor, unless you have any questions about CAFA, I'm going to move on to the next issue that was raised as a basis for federal jurisdiction and that would be federal question jurisdiction.

So federal question jurisdiction is -- the

only basis for the federal question jurisdiction argument here is what's the been called a special and small category of federal question jurisdiction. And the Fourth Circuit has specifically provided guidance with respect to this issue as well.

In a case called Flying Pigs, a very colorfully named case, Flying Pigs, LLC v. RRAJ Franchising, LLC, Fourth Circuit recognized that in order to fit in this tiny, little area -- and what it is is if you have state law claims but every single piece of the state law claim would require some resolution of a federal issue, and it would be a significant, substantial federal issue for purposes of the federal systems as a whole, it wouldn't interfere with the federal state balance, it would be actually in dispute. There's a -- there are four specific elements to this test. And it's a conjunctive test; in other words, every single element has to be met.

Here's what the Fourth Circuit said about what needs to happen in order to qualify for this very narrow window of federal question jurisdiction.

This is quoting the Fourth Circuit, As we've recognized the plaintiff's right to relief for a given claim necessarily depends on a question of federal law only when -- and this word is actually emphasized in the opinion, it's underlined -- only when every -- every legal theory supporting the claim requires the resolution of a federal issue.

Now, the defendants have claimed that some of the claims here involve resolution of a federal issue, but the bottom line is that unless every legal theory supporting the claim requires the resolution of a federal issue, it doesn't qualify for this jurisdiction. I mean, excuse me, yeah, for this federal question jurisdiction loophole.

So we've got a public nuisance claim under the -- under the -- under the state statute that provides for public nuisance claims, we've got a common law nuisance claim, we've got a common law trespass claim, we've got conspiracy claims, all of which can be and, in many cases, will be resolved without reliance on any federal issue.

Now, the defendants have said, well, the --

the complaint cites to the Controlled Substances Act and whether or not the defendants complied with Controlled Substances Act, that's true. And there may be an element of this case that involves determining whether or not, for purposes of some of these claims, the defendants violated or did not violate the Controlled Substances Act.

But as I just said from the Fourth Circuit, in order to qualify for this narrow window of federal jurisdiction, every legal theory -- every -- the Fourth Circuit emphasized the word "every," -- every legal theory supporting the claim requires the resolution of a federal issue. And it's beyond doubt that not every legal theory here would require a resolution of a federal issue.

In fact, as you know, Your Honor, in filing cases in Virginia, you talk about the acts of the defendant, say they acted negligently, you go to trial, you put on the evidence of negligence. That evidence of negligence may, under other circumstances, violate something else, but you don't have to mention that. You can present to the jury

the evidence that you have, the bad acts of the defendants, and under Virginia common law you can recover if the jury finds you to be negligent.

Count I is a statutory public nuisance claim that only exists in -- under Virginia statutory public nuisance law. The Count II, the common law nuisance, negligence. All of these things are intertwined with and require, for the most part, resolution of only state law issues.

And remember it has to be every single piece of our claim has to be founded upon a federal issue -- requiring the resolution of federal issue in order to meet this loophole. And that is simply not the case. So there's no basis for federal question jurisdiction here.

And let me point out real quick, Your Honor, in the defendant's briefing, at one point they -- they had said that, Well, if -- they misstated this particular -- this particular legal theory. And they said, Well, we've got some claims that involve the resolution of a federal issue and, therefore, that will be enough. Well, that's --

that's just not the case. The Fourth Circuit has said it has to be every legal theory supporting the claim. There are lots of state law theories supporting the claims.

So, Your Honor, I'm going to move on to diversity jurisdiction. The diversity jurisdiction arguments here actually involve two different theories. One is fraudulent joinder and the other is Rule 21 severance. And if I will, Your Honor, I'd like to sort of set the stage for you for this argument.

So there's a nondiverse defendant in this case. When the case was -- and this is a tangential undisputed fact. When the case was removed, there was actually a motion to amend and an amended complaint sitting in the Alexandria Circuit Court that the Court had not actually entered the order yet on the amended complaint. The defendants swooped in and removed it before the Court got the order entered.

The amended complaint would have added additional nondiverse defendants who also happened

to be distributor defendants; but as we sit here today, we're working off the original complaint because that's the complaint that was in effect at the time of the removal because the order hadn't been entered yet.

So we did have a nondiverse defendant in the original complaint. It's an entity called McKesson Medical. There's actually two distributor defendants with the name McKesson in -- in the complaint. McKesson Medical, no one disputes McKesson Medical is a Virginia citizen for diversity jurisdiction purposes and their presence would destroy diversity jurisdiction.

The defendants, therefore, argue with respect to fraudulent joinder. They claim that there are not sufficient factual allegations in the complaint to support relief against McKesson Medical and, therefore, they have been fraudulently joined. In a second, I'm going to show Your Honor exactly why that -- that argument has no legs.

The second thing they do is that when a fraudulent joinder argument is narrowly focused in

on McKesson Medical as a nondiverse defendant, for Rule 21 severance, they broaden the scope to all distributor defendants who are identified in the complaint and they say that Your Honor should sever the distributor defendants from the manufacturer defendants all together. And once you sever all the distributor defendants, you will then in that bucket take with you the nondiverse defendant and, therefore, it will preserve federal jurisdiction as to the manufacturer defendants.

I think it's important to note out of the box that there are multiple federal district courts within the Fourth Circuit that have rejected both of these arguments unequivocally. And, Your Honor, I'd like to start with respect to the fraudulent joinder argument, and actually the Rule 21 argument.

Judge Hendricks down in South Carolina issued a couple of decisions, some of the other South Carolina judges did too, and she had some things to say about this. And she talked about the fact that, as described in the filings in this case -- and that case was another opioid case,

involved very similar allegations, involved many of the same defendants. The prescription drug supply system in the United States involves manufacturers, or defendants here, distributors, or defendants here, and other entities all of whom are involved at one stage or another in one capacity or another in delivering prescription drugs to patients. This delivery of prescription drugs takes place within a complex system that controls the price and flow of drugs in America. It's supposed to be a closed system.

In accordance with that, the laws and regs that have been cited should be in place all along the distribution chain to prevent prescription drugs from being diverted anywhere other than the legitimate channels.

All of these defendants are in that supply chain. Based on the foregoing, the Court, Judge Hendricks, finds the removing defendants have failed to make a showing that these defendants were fraudulently joined.

So, Your Honor, this argument, this

fraudulently joinder argument has already been rejected in an opioid context and for good reason.

Your Honor, do you happen to have a copy of the complaint up there with you? Because, if not, I have a copy that I can hand up to you that I'd like to --

THE COURT: You can just tell me what you want to tell me.

MR. CONRAD: Okay. Well, Your Honor, what I'd like to do very quickly is I just want to go through -- there -- there have been multiple statements in briefing and things that have said that McKesson Medical, which is the Virginia nondiverse defendant, that the complaint is devoid of specific factual allegations against McKesson Medical. And that's absolutely not the case.

And what I want to do is -- very quickly, I want to run through the specific allegations of the complaint. And we've cited these in our brief, but I think it's important to show the Court exactly how detailed some of the descriptions are in the complaint about McKesson Medical.

So, first of all, the defendants have -- have tried to analogize this case -- this fraudulent joinder part of the case to other cases outside the opioid context where courts have said, Well, there are really no specific allegations against this particular defendant so clearly they were just tacked on to destroy diversity and so, therefore, they're fraudulently joined and we can ignore their presence.

Now, Virginia courts, including this district, have said, look, the only way that you can show fraudulent joinder is if you can show that there was no possibility of recovery against the allegedly fraudulently joined defendant. No possibility of recovery.

In fact, one court said in Virginia state courts usually you just have to say negligence in your claim, your pleading -- the notice pleading standards. So as long as you've got some facially valid allegation of negligence, which is a really, really low bar in the Virginia pleading standard, then the defendant is not fraudulently joined.

I suggest to you here that we have far and away exceeded what was already a very low bar. So if you imagine a high jump being set and we only had to get a foot over, we jumped ten feet over. And that's what I want to do, is go through and show you that not only have we alleged a possibility of recovery, we've alleged a very clear likelihood of recovery.

First of all, unlike the cases that the defendants have cited, the allegations against McKesson Medical are not simply vague allegations against all defendants. So the cases the defendants want to rely on talk --

THE COURT: Tell me what allegations you've made against them.

MR. CONRAD: Your Honor, there is a subcategory of defendants called the distributor defendants, they are alleged as such. Distributor defendants are a particular category within the complaint. So right above paragraph 92 in the complaint, there is a subhead C in bold, all caps, says distributor defendants. And then underneath

that through the following paragraphs 92 and following, it identifies specific different distributor defendants. So if you go underneath the distributor defendants subhead to paragraphs 99 through 101, there's specific allegations about McKesson Medical being a Virginia corporation and being a wholesale distributor of pharmaceuticals, including opioids.

You then flip through a few more paragraphs after the other distributor defendants have been -- have been identified. Paragraph 111 of the complaint then says, The distributor defendants listed above -- which includes McKesson Medical, there's four or five of them -- The distributor defendants listed above are collectively referred to herein as, and then it's quoted, distributor defendants.

And then paragraph 112 says, The distributor defendants, which includes McKesson Medical, purchased opioids for manufacturers and sold them to pharmacies throughout Virginia. The distributor defendants, including McKesson Medical,

played an integral role in opioids being distributed across Virginia, including Alexandria.

Paragraph 113, the failure of all distributor defendants, including McKesson Medical, to effectively monitor and report suspicious orders of opioids and implement measures to prevent the filling of invalid medically unnecessary prescriptions greatly contributed to the increase in opioid overuse and addiction. Distributor defendants, including McKesson Medical, directly caused a public health and law enforcement crisis across the country, including in Alexandria. Those are directly -- that's a direct quote from the complaint.

You flip back further, paragraph 259 of the complaint is -- there's a subhead right above paragraph 259. It says, Manufacturer and distributor defendants, which includes McKesson Medical, violated the requirements to prevent diversion and report suspicious orders under both Virginia and federal law.

Paragraphs 259 -- and I won't read you

every one, but paragraphs 259 through 266 then lay out specific allegations against both the manufacturer and distributor defendants for liability. All those allegations included McKesson Medical to the extent they're ident- -- they're directed as distributor defendants.

Go to then paragraph 282, there is a subhead again, distributor defendants. And remember, every time the complaint says distributor defendants, McKesson Medical is specifically --

THE COURT: I understand.

MR. CONRAD: -- included.

THE COURT: I understand that.

MR. CONRAD: Paragraphs 282 all the way through paragraphs 306 include specific allegations that have -- that the distributor defendants have done. It's a whole subpart of the complaint.

So paragraph 228 talks about the legal duties that were legally required of the distributor defendants. Paragraph 283 talks about what they were required to do to create a system to identify and report suspicious orders of controlled

substances.

The only part of this entire section from 282 through 306 that does not include McKesson Medical is one paragraph which in the Alexandria complaint is paragraph 293.

Paragraph 293 has several subparts that specifically talk about federal government regulatory and other activity target specifically at some of the distributor defendants. And so this one paragraph, paragraph 293, says, oh, by the way, some of these distributor defendants have actually been the target of -- of -- one was a settlement with the -- with the DEA, another was a memorandum agreement between one of the entity -- one of the distributors and the DEA, another was a DEA issuing a show -- a show cause. And these -- in that paragraph McKesson Medical, at least as far as we know right now, was not the subject of a DEA enforcement or anything like that.

What the defendants tried to do is say, well, because some of those specific distributor defendants were the subject of that and you

specifically called them out, that somehow that that should result in ignoring all of the other complaint's allegations about what McKesson Medical did. And that is frankly a -- not only an inaccurate reading in the complaint, it's a -- it's a -- there's no basis for that reading of the complaint. It's absolutely abundantly clear from the allegations that McKesson Medical is specifically included in these dozens of allegations about what the distributor defendants did wrong.

THE COURT: All right. I understand your position.

MR. CONRAD: The next issue then, Your Honor, beyond -- and just to wrap up on that, Your Honor, there's more than a possibility of recovery against McKesson Medical. Again, we -- we had to clear about a one-foot bar, we cleared a ten-foot bar on that. And the Court should reject that as a basis of federal jurisdiction.

The last argument for federal diversity jurisdiction has to do with Rule 21, and that has to do with the -- the idea that the Court should

somehow sever off the distributor defendants from this case. As I said before, this is a slightly more widely focused argument. It includes all the distributor defendants, not just McKesson. I'd say, Your Honor, that first there's a -- there's a legal issue here, which is that Rule 21, there are multiple District Courts that have called into question the use of Rule 21 to create -- in effect, create diversity.

So, in other words, your -- your role -- the Court's role is to determine as a -- as an initial matter whether or not there is federal subject-matter jurisdiction. And if it doesn't have federal subject-matter jurisdiction, the proper course is to remand the case.

And so there's a -- there's a serious question as to whether or not a Court that does not have subject-matter jurisdiction in the first instance can somehow manufacture that by severing certain defendants under Rule 21, particularly in the context of removal or specifically in the context of removal.

We don't think -- we believe that it would be improper to exercise any sort of discretion on Rule 21 when there's clearly no subject-matter jurisdiction here. However, to the extent that you reach the Rule 21 severance argument, there are multiple other District Courts in the opioid context that have all rejected this particular argument under these circumstances.

And again, Your Honor, the observations from -- and there are several cases that deal with this, but I'm going to specifically talk about Judge Hendricks and one of her decisions out of South Carolina. And what Judge Hendricks said was -- she said, The facts alleged in the complaint are sufficiently intertwined with respect to all of the defendants. The claims are not so separate and distinct that keeping them joined would result in an injustice. On the contrary, keeping the parties and claims joined would promote efficiency, minimize delay, inconvenience, and expense to the parties.

Indeed, if the Court were to order severance to obtain federal jurisdiction, the county

here stands to suffer significant prejudice as the defendants in each case would have the ability to shift blame and responsibility to an absent party. So the manufacturer defendants would be able to shift blame to the absent distributors, in the words of Judge Hendricks, thereby forcing the county to defend the actions of the absent defendants in order to substantiate its claims against the defendants present in each case.

Then Judge Russell in a -- in a case involving -- involving the same issue out of the city of Baltimore -- this was a -- this was a Maryland decision. He said because the city's claims against these defendants are factually and legally intertwined with its claims against the other defendants, the Court concludes that they're necessary and dispensable -- indispensable under Rule 19 and thus are not severable under Rule 21; thus the Court will not sever these defendants to create complete diversity among the parties.

Those are the kinds of things the judges in district courts and the Fourth Circuit have

concluded when presented with this same argument. Again, as I started, as Judge Hendricks points out and as is clear from reading the complaint, these are factually and legally intertwined issues. You've got the manufacturer distrib- -- excuse me, defendants who are making the drugs, you've got distributor defendants who are distributing the drugs; those issues and claims are intertwined and you can't just simply carve one off the other.

And, in fact, as far as we can tell, there's no case in the opioid context that has determined that it's a good idea, under these kind of circumstances with manufacturer and distributor defendants, to grant severance.

THE COURT: All right. I understand your theory.

MR. CONRAD: Your Honor, the bottom line is that you can look throughout the -- it's -- the jurisdictional arguments have been made here and, frankly, the defendants don't have any specifically on-point authority. All of -- all of the authorities that is on point with these issues, all

is in favor of the plaintiffs, all of it's in favor of remand. And what the defendants have done is they take cases in other contexts that are not material and on point and cobble together different sorts of legal theories. They've taken snapshots out of a long complaint and tried to put together for you an argument that somehow, by taking all these disparate things, we can sort of create federal jurisdiction out of whole cloth.

The bottom line is that the Fourth Circuit has addressed several of these issues specifically, district courts in the opioid context have addressed many of these issues specifically. And every single one of those materially on-point decisions point in the direction of remand.

THE COURT: All right.

MR. JORDAN: Good morning, Your Honor. Bill Jordan again on behalf of the removing defendants. I represent Optium and UnitedHealth Group, Express Scripts, and other pharmacy benefit managers also joined as -- as removing -- removing defendants here. I'll address counsel's arguments

in turn starting with CAFA and then going into federal question.

Your Honor, unlike many cases where a matter has been removed, under CAFA the general notion related to the presumption against removal doesn't apply. The Supreme Court told us that and the Dark Cherokee case said that, No anti-removal presumption attends the cases invoking CAFA, which Congress enacted to facilitate removal. Especially where there are matters -- there are 1,500 matters like this pending before Judge Polster in the MDL. This is clearly a matter of national importance, the opioid crisis is certainly a matter of national importance and one that CAFA was enacted to ensure a standard national framework for resolution.

To be sure, Your Honor, Virginia does not have a Rule 23 class action procedure as a matter of its rules of civil procedure, but what plaintiffs have filed is a class action in name only. I'm going to walk through why that is as to matter of law and also why it is as a matter of equity.

Plaintiffs' counsel stated that they did

not bring this matter in a capacity as a representative of its residents. They, however, have relied upon the case West Virginia versus CVS which granted remand, did not allow federal -- federal removal to occur, where the state was bringing the case. In that case the state, as a sovereign, was bringing a case in its parens patriae authority.

A city or a county -- a city does not have parens patriae authority. It is merely a political subdivision of the state, it is a citizen of the state. It can only sue in its own individual capacity. And so when one then looks carefully at the language that they put in their complaint, they are absolutely the masters of their complaint, which requires us to look at what they are asking the remedy that the Court order.

The remedy that they are asking is a remedy for both themselves as a citizen of the state, as an injured party with the same injury, the same cost -- the same things being borne by its residents. They are suing in the name of a -- of a party that has

been injured on behalf of itself and its residents. And how do we know that. Well, let's look at what they -- what they said and then compare it to the language of their complaint.

They state, Plaintiffs seek relief and damages for the harm caused to them, a municipality. They say that the damages sought by the plaintiff -- this is in paragraph 6 of the rebuttal brief -- are not damages common to any class members. Instead, we seek damages, past, present, and future expenditures of public funds.

In their rebuttal brief they say, There is no claim in the complaint whereby the city is bringing a claim on behalf of its citizens, such that its citizens will be bound by any judgment. This is demonstrably not true when one looks at the language.

We cite to numerous paragraphs within the complaint where if they prevail, if they were in state court under Rule 1.1 relating to judgments in Virginia, the residents of the state of Virginia -- or the residents of the city of Alexandria will, in

fact, be bound by their judgment. Why is that? We have cited through numerous paragraphs, and I'll just cite a few of those -- of those for you, Your Honor.

Numerous paragraphs in the complaint, Count 3 where they're seeking reimbursement of monies paid by the manufacturers which would necessarily bind the residents if judgment were entered, where they want to know -- want to know what the citizens and what the -- what the plaintiff actually paid for the manufacturers' products. If they prevailed and recovered to the $100 million they want, the residents would be bound by that judgment. They could not bring a claim for reimbursement of those funds.

Similarly, they state in Count 4 that the defendants made misrepresentations and omissions of material facts to plaintiffs and its residents to induce them to purchase, administer, and consume opioids; were they successful on that count, the residents would be bound. Plaintiff then -- this is -- that was at paragraph 371.

They state, paragraph 377, Plaintiffs and its residents reasonably relied upon the representations made by defendants, which caused plaintiff, through its programs, departments, and agencies, to incur -- to incur costs. The material misrepresentations and reliance by the -- by the residents.

Most notably, however, in their final count for unjust enrichment, their equity count which I really want to touch on here. They state that at the time -- this is paragraph 431, in exchange for opioid purchases and at the time plaintiff and its residents made these payments to the manufacturers or distributors, plaintiffs and its residents expected the defendants had not misrepresented any material facts. And they then seek disgorgement of profits on behalf of the plaintiff, the City of Alexandria and its residents. Were the Court to issue a ruling, it would bind those residents who would then be precluded from recovering those types of damages.

And so on the -- the point where we -- so

we then look through and say they have named -- they have created, as a matter of law, a class action in name only. We then look through and see, are the typical standards that are required for the maintenance of a class action apparent on the face of the complaint. Commonality, typicality, numerosity, adequacy, and they absolutely are. And we go through each of those requirements within our notice of removal.

And so as a matter of law, given the language of CAFA, they have set forth a class action of national importance that CAFA was designed to seek to be brought in federal court, but it's not just as matter of law, there actually is a provision as a matter of equity in Virginia that allows representative actions to be brought. They bring claims at equity as well as at law.

This line of cases goes back all the way into the -- into the 19th century, started with a case called Bull versus Read in 1855, it's 54 Va. 78, where the Virginia Supreme Court says that the act in question is, when necessarily affecting all

inhabitants of the district named in respect to persons or property who were liable to taxation and as they were many in number that had a common interest, it, this representative lawsuit, was allowable, according to settled practice, for some to file a bill on behalf of themselves and other inhabitants similarly situated, seeking any relief of which they might all have in common.

And it really goes back to common law. There's a matter called a representation in equity at common law incorporated in Virginia and relied upon by the Virginia Supreme Court in a strain of cases. It started with Bull, there's a case called Blanton in which a -- citizens were allowed to bring a representative action against a manufacturer, a fertilizer company. That is at 77 Va. 335.

There is an act -- matter called Bosher versus Richmond at 89 Va. 455. And in each of those cases, as a matter of equity, which still exists under Virginia law, a class action or a representative action may be maintained. And here, that's exactly what they are seeking to do. They

are not a state sovereign. They may not bring a parens patriae action. They are seeking recovery for the same injuries that they have on behalf -- on behalf of their residents as a part of that class; and, therefore, removal under CAFA is appropriate.

I'd like to talk as well about the federal question argument. The federal question is just as appropriate for removal. My colleague on the plaintiff's side is correct that a claim under the Grable standard that the Supreme Court has articulated does require that the federal question, the federal issue be necessary for the resolution of that particular claim.

The claim that we look at, Your Honor, is count Number -- it changed. Let's see. Count Number VI. In Count Number VI, the plaintiffs cite to both the Virginia Drug Control Act, but also cite to federal law, the Federal Controlled Substances Act. And that is the basis for our federal question removal.

The federal Controlled Substances Act, national uniform law governing the distribution

manufacturer sale of controlled substances, including the substances at issue here. The Virginia law on which they're relying incorporates expressly the violation of the Virginia law. It says that if you violate the Controlled Substances Act, you violated the Virginia law. It sets forth standards that are the standards that it must comply with the Controlled Substances Act. There's not separate Virginia law that is different from the Controlled Substances Act. One has -- if one violates the Controlled Substances Act, it has violated the Virginia law.

And, therefore, all it has done is -- where they say it's Virginia law and federal law, all that claim is is for a violation of the Controlled Substances Act that is necessary, it is required, it is fundamental to that particular claim, it is entirely appropriate for Grable removal, which admittedly is one that the Supreme Court has said is a narrow grounds for removal. You have to find that the federal question is, in fact, appropriate for the elements of that particular claim; and we submit

it is.

You -- in order for them -- in order for the plaintiffs to be successful on that claim of negligence, per se, in count VI, it definitively requires a resolution of the Controlled Substances Act for them to prevail. And that's why we believe that is appropriate grounds for removal.

My colleagues are going to -- you may want it hear again from the plaintiffs. My colleagues, however, after hearing this great argument, are going to address the issue of why we believe that a stay is, in fact, appropriate after you've heard argument on -- on the remand, the why -- given the national importance of these and given similar issues pending before the MDL judge, why it's actually appropriate for Your Honor to --

THE COURT: All right.

MR. JORDAN: -- stay his decision at this time.

THE COURT: All right.

MR. MASSIE: Good morning, Judge. Wade Massie from Abingdon on behalf of the Purdue

defendants, as I said earlier.

We're the parties that filed the supplemental notice, so the original notice was filed and then we appeared and filed a supplemental notice. Our supplemental notice deals with the issue of fraudulent joinder and severance. So those are the two subjects I wanted to discuss this morning.

Just to orient the Court, there are four of these distributor defendants and they are described in the complaint at paragraphs 92 to 113. One of them -- it's a little confusing because some of the names are the same, but one of them is called McKesson. And that one is described as one of the largest distributors of opioid pain medications in the country, including Virginia. And in 2015, McKesson had a net income in excess of 1.5 billion, so that's one of the distributors that's been sued here.

A second one that was sued is McKesson Medical-Surgical. I want to pass over that one just for a second. The third one that has been sued here

is called Cardinal or Cardinal Health. And Cardinal Health is alleged to distribute pharmaceuticals to retail pharmacies and institutional providers to customers in all 50 states, including Virginia, so it's a large entity.

And the last one named is AmerisourceBergen Corporation, and it likewise is alleged to distribute pharmaceuticals to retail pharmacy and institutional providers and customers in all 50 states. And those three are alleged to have employees as well, obviously, doing this.

Now, the one we're focused on was this one I passed over for a second, McKesson Medical. And the allegation against them in this part of the complaint is that it engages in business in Virginia as a wholesale distributor of pharmaceuticals, including opioids. And they also allege they have a registered agent. That's what they say about them.

Now, if you look at the way the complaint is set up, it has a section in it beginning about paragraph 166, which they call themselves -- they call the particulars regarding each defendant

group's role in the opioid epidemic. And if you go through that section of the complaint dealing with these distributor defendants, there are specific references to McKesson, that first one I mentioned, to Cardinal, and to Amerisource, but there is no mention at all of McKesson Medical-Surgical, which is the one we're putting in question.

And I would invite the Court's attention to paragraph 293 which has a specific lineup of claims against those companies. And it's really the -- the meat of the complaint because it says, Despite their duties -- and they go through this long windup of what the duties are -- despite their duties, defendants have knowingly and negligently allowed diversion. And then they cite DEA action taken against the companies, and they say the wrongful conduct and inaction have resulted in numerous funds and penalties including -- and that's where they list these other companies, and no mention of this Medical-Surgical -- McKesson Medical-Surgical.

So we question that and we ask, you know, where are the specific allegations against this

company that they allowed their product to be diverted in Alexandria, that Alexandria was damaged by this. All -- all we have and you've heard here are these general allegations but no -- no real specific allegation as to McKesson Medical-Surgical. So we think the case is similar to one that was decided a few years ago in Salisbury versus Purdue Pharma where the plaintiff sued nine manufacturers and two pharmacies.

And, of course, they said the pharmacy should have protected what they were doing and the manufacturers should have protected what they're doing, but there was no real connection in the case. There was no real allegation that the pharmacies had actually sold the opioids to the plaintiffs. And the Court in that case found fraudulent joinder.

We acknowledge this standard that's been stated in the cases, this no possibilities standard, but the cases also say it's to be applied reasonably and there must be a reasonable basis for predicting liability. And when we have a challenge to this, we ask where is the causation, where is the claim that

it happened in this city, where is the claim that something was diverted that this particular entity sold. There are really no answers to that.

The plaintiff's brief and also their argument here this morning addresses other cases that they say support their position. And they -- they say in their brief, and I think they said this morning, that the district courts have already rejected all of our arguments, already heard and rejected all of our arguments. That was the -- that's the statement. We submit that's not accurate. They cite cases from South Carolina, they cite a case or two from Maryland, they cite a case from West Virginia, they cite some cases from Texas, but none of those cases deal with this point that we're raising.

South Carolina cases involved a different fraudulent joinder argument altogether. It involved an argument that the plaintiff had no real intention of obtaining a judgment against one of these minor players that had been named in the complaint. So -- but there were in that case specific allegations

made. So it's not like the situation here where we don't have those allegations.

The Maryland cases did not involve a claim of fraudulent joinder at all. There was no claim of fraudulent joinder in those cases that were cited to you. There was a misjoinder argument, which is something different.

The West Virginia case did involve fraudulent joinder, but a very specific issue of West Virginia law, whether an employee or agent could have liability under the circumstances. Again, there were allegations against the person. The question was did that state a claim under West Virginia law. So it is a different situation.

Likewise, the Texas cases that are cited did not involve fraudulent joinder but this concept of fraudulent misjoinder, which is something different.

There are, I understand, a lot of cases, many cases in the MDL now that involve this situation of a removal based on fraudulent joinder or misjoinder or severance. In fact, one of my

colleagues collected and filed a list of those cases in the Western District of -- Western District of Virginia. I don't think it's filed here, but it's filed very recently, on January 15th. And in that filing they identified 97 cases where there was a removal and then a subsequent transfer to the MDL, which has -- has similar issues pending. So that's fraudulent joinder.

On the severance part, that is a -- that is a completely separate argument and position. And if you look at a severance issue, if the person is not fraudulently joined -- so if -- even if the person is in the case, the Court would need to consider whether that person should be severed.

And Rule 21 would allow a severance so long as the nondiverse party is not required to be joined under Rule 19. So if they're not an indispensable party, not a required party under 19, they can be severed in order to maintain diversity.

Now, we submit there's no question that this party, McKesson Medical, is not an indispensable party to this case. If anything, it

would be a permissive party that -- that one may add or not add, but it would not be an indispensable party.

The argument is made that McKesson Medical's liability is intertwined with other defendants; but, again, that's not a prohibition against a severance. Rule 20 assumes that there's some connection among the defendants to bring in the same case, that they arise out of a common transaction or occurrence or have a common issue. So that's -- that's not a prohibition.

There is a case that's been cited to Your Honor, Mayor & City Council of Baltimore, that suggests that in that case some defendants were indispensable; but if it's cited for the concept that any joint tortfeasor, any joint wrongdoing is indispensable, then that's -- that's directly contrary to Supreme Court law in the Temple case where the Supreme Court said that joint tortfeasors are not indispensable parties, they are permissive, and you don't have to add them.

And we know this just from practice because

if you -- if you had a situation where every joint tortfeasor had to be in every case -- every tort case, there wouldn't be too many cases that could go. A lot of them -- a lot of cases would be disqualified just because you didn't have every possible tortfeasor there in the case.

So we submit that -- that the Court ought to consider, if it considers this defendant properly joined, it ought to sever this defendant and exclude it from the rest of the case.

I'll just make one -- one more point, if I may, Judge, and I'll sit down. There's also a suggestion made that diversity has to exist at the time the complaint is filed. And, of course, we know that to be the general rule. You have to have diversity at the time the complaint was filed.

It's obviously true generally, but Rule 21 is a big exception to that, so this severance is a -- is a huge exception. There are Fourth Circuit cases, this Beatrice Pocahontas case and U.S. Supreme Court case, Newman-Green, which holds explicitly that you can sever even after an action

was brought, even on appeal. So we think we're on solid ground on that.

Thank you, Judge, for your time. I appreciate it. Thank you.

MR. CONRAD: Your Honor, unless I'm mistaken, I think the defendants have gone through all their responses. So I don't think there is anyone else from the defendants' side.

THE COURT: All right. Just quickly now, I've heard a lot of argument.

MR. CONRAD: I know you have, Your Honor, and I want to go very, very quickly. And I'm going to go in the exact same order I started and the same order you've heard it. So I want to make sure I just touch on a couple of quick things on each point.

So I'll start with the CAFA issue. So, first of all, there are -- there are two main points that I want to make, one is legal and the other is factual. The legal points I want to make are that the West Virginia v. CVS Pharmacy case, the Fourth Circuit case, specifically said that the whole issue

of whether or not the complaint was or was not a parens patriae action, which is something the defense had talked about, was not critical to the analysis. That was what was critical to the analysis was that the complaint was not brought under a state statute or rule of judicial procedure similar to Rule 23. Don't have that here, so West Virginia is still on point.

Secondly, in the AU Electronics case, which was a later Fourth Circuit case, the Court rejected what's called the claim-by-claim approach, the Fourth Circuit -- and adopted or embraced something called a whole case approach. What that means is you can't just go claim by claim and say, well, this particular claim looks like a class action, therefore there's CAFA jurisdiction. You have to look at the complaint as a whole to determine whether the complaint as a whole has CAFA jurisdiction. So that's the legal point.

The factual point I want to make is that the defendants are simply incorrect on the allegations in the complaint. For example, they

said that Count III includes claims on behalf of the city and its residents, that simply is not the case with this complaint.

This complaint, Count III, is a Virginia Consumer Protection Act claim. The Virginia Consumer Protection Act says plaintiff -- which is the City of Alexandria, seeks reimbursement of all monies paid for defendants' products by plaintiff, period.

It says, as a proximate result of defendants' deceptive acts, defendants have caused plaintiff, the city, to incur excessive costs responding to the opioid crisis. And then it lists costs, including the cost of healthcare, emergency medical center services, social services, same thing in every single one of these counts. I could go through and read them all to you --

THE COURT: Well, no, don't do -- don't do that. I understand you all don't agree on the facts and you're not going to get those resolved right now by simply repeating again what you told me before. So if you've got something new to tell me, go ahead,

but I'm getting tired of listening now to -- I've given you more time than normal to do the -- make the motion, anyway. And I'm getting a little impatient now, so about two minutes I want to wrap it up.

MR. CONRAD: I got you, Your Honor. Federal question, the only point I make is they point to one count, count VI. And they say, Well, even though it says it's under Virginia law and incorporates federal law, therefore, because count VI involves necessarily some discussion of federal law at some point, therefore, there's federal question jurisdiction under this narrow loophole.

Bottom line is there are many more than count VI. There's a bunch of counts, and all the other counts involve state law. And, in fact, count VI involves state law. Their only point is that count VI state law, the Virginia controlled substances legislation, also refers and incorporates some federal law. And that doesn't transform it into a -- into this exception for Gunn v. Grable -- excuse me, Gunn v. Minton.

The second point I make is it necessarily raises is only one of the four required elements that they have to meet. They also have to show that the issue is substantial in the sense of it impacts the federal system as a whole. And there are opioid context cases that talk about the fact that this was not substantial because it doesn't impact the whole -- the -- the federal system as a whole in the way that the Supreme Court has said is important for these cases. So that particular area of federal jurisdiction is not available.

THE COURT: Okay. Now --

MR. CONRAD: I'm sorry, Your Honor, I have -- I have one more piece on the diversity jurisdiction. So 30 more seconds.

THE COURT: 30 seconds, then I've heard enough.

MR. CONRAD: Yes, sir. With respect to the -- there are multiple cases out of South Carolina, out of Maryland that all deal specifically with fraudulent joinder. And in particular in South Carolina, they all deal with this question of

whether or not there's sufficient allegations. It's a complaint-by-complaint analysis. We pointed out to you all of the -- all of the pieces --

THE COURT: Okay. I'll take a look at those cases.

MR. CONRAD: Also Mr. Massie, in talking about Rule 21, he was talking specifically about severing McKesson Medical. That's actually not what they've asked for. They've asked for severance of all the distributor defendants, not just one, McKesson Medical. I would argue to the extent they're limiting somehow for the first time here today, it's totally improper, Rule 21 doesn't apply to that.

And to the extent that they want to stick with their argument that all distributor defendants should be severed, that should be rejected as well.

THE COURT: All right.

MR. MENCHEL: May it please the Court, my name is Matthew Menchel and I represent the Express Scripts defendants and I'm here to discuss the motion to stay.

THE COURT: Okay.

MR. MENCHEL: Your Honor, I recognize that I'm in the Eastern District of Virginia and that using the words "motion to stay" an anathema to this district. But briefly deferring a ruling in this particular case under these circumstances so that the jurisdictional issues that are being heard in the MDL, which are the same issues that are being heard here so that these issues can be joined there, makes a lot of sense. And it's also consistent with the case law --

THE COURT: That's the questions of remand as well. Jurisdiction, remand, do the cases stay here, all of those issues will be decided --

MR. MENCHEL: Yes, Your Honor.

THE COURT: -- in the MDL then.

MR. MENCHEL: Yes, Your Honor. Right now, as was mentioned by my other colleague, there are approximately 100 cases pending that have been removed on jurisdictional issues. The vast majority of those have motions to remand attached to them or will have motions to remand attached to them going

forward.

And what the Eastern District of Virginia has said in the Commonwealth of Virginia versus [sic] ex rel. Integra, courts frequently grant stays while awaiting a JPML decision. That's what we're doing here, we're expecting that decision be handed down in March -- about the inclusion of a pending case into an MDL, even when other motions remain pending before the district court, including motions to remand.

Another decision in the Eastern District, Pagliara versus Federal Home Loan Mortgage Corporation, said the same thing. Additionally, courts frequently grant stays in cases when an MDL decision is pending.

THE COURT: Who decided that? Those two cases you're citing.

MR. MENCHEL: One second, please, Your Honor. This was Judge Cacheris, did I say that correctly?

THE COURT: Yeah.

MR. MENCHEL: And the Commonwealth of

Virginia case, Judge Lauck.

THE COURT: All right.

MR. MENCHEL: I think we cited these in our papers, Your Honor.

THE COURT: Go ahead.

MR. MENCHEL: So what we have here, Your Honor, is this general rule that courts defer ruling on the issues like motions to remand when there's an MDL because it makes perfect sense to do so. There are 1,600 cases currently in the MDL that are almost factually identical to the cases that exist here today. So it makes sense to stay this case so that it can be brought into the MDL.

There's already been a decision made by the JPML conditionally transferring the case in because it recognizes factually they look to be exactly the same as many other copycat complaints that have already been filed there.

So what I want to use by way of example is this CAFA issue which Your Honor has heard a tremendous amount of argument about here today. It's a complex difficult issue and it's also an

issue of first impression that will be decided by whatever court decides it, because there's unique facts and circumstances here. This is not a parens patriot act -- patriae act that's been resolved before, it's an issue of first impression.

And there are currently, right now, pending before Judge Polster in the MDL other CAFA remand motions addressing the same issues. We cited those in our papers. One is Jefferson County, it's in the Eastern District of Missouri, that's been transferred into the MDL. And another one, Your Honor, is the Noble County in the Southern District of Ohio case, also removed on CAFA, also right now pending before Judge Polster on the motion to remand.

So those issues as well as the federal question issues and the diversity jurisdictions and all those severance issues, those issues are already in the MDL in very similar cases. And so it makes sense from a point of judicial economy and for uniformity rulings that these -- this case gets transferred there as well and you defer this rule

and let Judge Polster decide that.

Now, just what I'm expecting you're going to hear from plaintiff's counsel is they can't bear the delay, it's going to -- it's going to prejudice them severely if there's a delay. I want to remind Your Honor that in this case the complaint was filed ten months ago in the Circuit Court of Alexandria, they've never served us with it, never. And three times the Circuit Court set this down for status conference and three times it was deferred until we finally removed it out. They're not in a rush to prosecute this case.

THE COURT: All right. You're giving me rebuttal before I hear the --

MR. MENCHEL: Fair enough.

THE COURT: -- hear the argument.

MR. MENCHEL: Fair enough, Your Honor. I'll sit down and I'll address it on rebuttal. Thank you.

MR. SPIVEY: Your Honor, Ed Spivey here on behalf of the plaintiff. Let me start where Mr. Menchel ended up. This case is one of several

that have been before the Virginia Supreme Court. On November 20th the Virginia Supreme Court issued an order that to our knowledge the Virginia Supreme Court has only issued a handful of times in history.

On November 20th the Virginia Supreme Court certified a three-judge panel of Circuit Court judges to preside over these consolidated proceedings, Judge Filson from Rockbridge County, Judge Milam from Danville, and Judge Hurley from Tazewell County.

And the reason that this City of Alexandria case was postponed was because of that very issue. It takes six plaintiffs, under Virginia procedure and under Virginia Multiple Claimant Litigation Act, to consolidate cases. And so there were subsequent cases filed over the course of last year and it has been the plan of the City of Alexandria and every one of the other affected localities who are plaintiffs in cases in circuit courts that have been removed across Virginia to consolidate and to deal with these matters efficiently, in an organized way.

And so, Your Honor, the Virginia Supreme

Court's action shows that, at the highest levels, the Virginia state court system is already involved in this. And the defendants have yanked us out of that state court system that was already underway under the guise of judicial economy without any regard for the efforts of the Virginia court system and, under the barest and slimmest of reads, sought removal jurisdiction. And that's what brings us here today, Your Honor.

If the defendants get their way, the City of Alexandria will be sent off to a federal court in Cleveland beside plaintiffs like the City of Chicago and the State of Alabama with only the slimmest hope that their issues can be resolved anywhere in the foreseeable future. Because here's what we know about the MDL -- and let me say at the very outset, none of my comments are intended as a criticism of Judge Polster who has presided over that MDL since its inception and who is doing the best job humanly possible to try to manage a behemoth case.

What we have a gripe with, Your Honor, is that these defendants have sought to embroil our

client in it when it is against our client's will. Indisputably, our client, who is the master of its complaint, has filed only state claims in a state Circuit Court; and there is no basis to disrupt and derail that effort through this junket to Federal Court.

Here's what we know about the MDL, Your Honor --

THE COURT: All of your friends or your compatriots are in federal court, haven't all these cases been removed?

MR. SPIVEY: Your Honor, no, we -- we've got a dozen cases in state court, Circuit Court, that were removed, yes, you're correct; and they are all the subjects of motions to remand like the one pending here.

I think it's important to point out there were other state -- Virginia localities who have filed suit, the defendants cite to them in their briefing, but this is an important thing to know, those cases were filed in federal court. They contained federal statutory causes of action. Those

plaintiffs wanted to be in federal court and wanted to be in the MDL. There was absolutely no opposition to the transfer of those cases to the MDL.

The City of Alexandria and another dozen plaintiffs like the City of Alexandria, in a number that will grow, want to be in state court. So those other Virginia cases that are now in the MDL are completely beside the point.

THE COURT: Right. Well, the ones that were filed simply under state -- supposedly state causes of action; those have all been removed as well, have they not?

MR. SPIVEY: They have, Your Honor. And they're all pending before District Court Judge Dillon in the western district before whom we appeared yesterday on these same types of issues, these same motions.

So here's what's important to know about the MDL because it's a critical distinction from any of the cases they've cited. Judge Polster convened that MDL in December of 2017, 14 months ago. And

we've put into the record the transcript of his first organizational meeting of counsel, and in that first meeting he specifically said with regard to motions to remand that had already been filed in cases that were referred to him initially in the MDL in December of 2017, that he was going to let them hang there. And then he issued an order which put a moratorium on the filing of motions. This is an order that was entered on April 11th, 2018, and he specifically referenced motions to remand. And what that order says is the Court will adopt a procedure based on input from the parties to efficiently address the filing and briefing of motions for remand at an appropriate time in the MDL proceedings.

Here's what I can tell you with absolute certainty. No procedure has ever been adopted in the MDL to deal with those motions for remand as we stand here today, and those motions for remand that were part of the very initial group of cases that got sent to the MDL in 2017 -- and there were many of them -- stand unresolved and undecided today.

That's what we know about the MDL.

And so -- and, again, I'm sure that's for good reason, but what we're saying, Your Honor, is you've got to look past this tantalizing prospect that the defendants hold out to you that, oh, this is just a short delay. Oh, it won't be -- it won't be that bad on the plaintiff. Your Honor, we know that if we get transferred into that MDL, we're never getting out or we're not getting out for a very long time.

And so here's what I'd like to make sure you understand about the timing of things, the defendants, the day after or two days after they removed this case, filed what's called -- called a Notice of Tag-Along Action with a judicial panel on multidistrict litigation. They identified this case to the JPML and that, as they knew it would, triggered a reflexive order from the JPML, conditionally transferring this case into the MDL.

Now, that was a conditional transfer order and it specifically said that the plaintiff had an opportunity to file a notice of opposition, which we

did timely about two -- two weeks ago. We have also, pursuant to the JPML's rules, filed a motion to vacate that CTO. And we are told, although we have no assurance, that nothing will happen in the meantime. We are told that that motion to vacate will be heard at the JPML's next hearing session in late March 2019.

We know of no assurance that the JPML won't act on that CTO before then, but the defendants have stated that that is when the motion to vacate will be heard. And what we also know is that, in the course of this opioid MDL, the JPML has never failed to render final a conditional transfer order.

So I think everybody agrees that if we get to that date, this case is going to be transferred. And without any desire on our part, our case is yanked out of the City of Alexandria and we're off in Cleveland for some indeterminant time.

Your Honor, that is not the way federal jurisdiction is supposed to work. What these defendants are asking you to do is to engage in nonresolution of what should be the primary first

and all-important question that this Court has about this case; mainly do you have jurisdiction over it. That is the way the system of limited federal jurisdiction is supposed to work, and that, Your Honor, we need to look no further than to the Fourth Circuit to know that.

In several cases the litmus test is laid out. The threshold question in any matter brought before a federal court is whether the Court has jurisdiction to resolve the controversy involved, that's 17th Street Associates. Courts typically must construe removal jurisdiction strictly because of the significant federalism concerns implicated by it. That's a Fourth Circuit's decision in Maryland Stadium.

The burden of demonstrating jurisdiction resides with the party seeking removal. Thus, in deciding whether to remand, this Court must resolve all doubts about the proprietary of removal in favor of retained state jurisdiction, that's the Fourth Circuit in the Hartley case. That's the -- that's the way things are supposed to work.

The way the defendants would have you address this stands that on its head. It's completely upside down, they urge you not to resolve jurisdiction. And, Your Honor, we submit that the prejudice to our client if the Court would -- would do that is extreme because this is not a short delay, it's a small delay on the way to a very lengthy delay in a situation where there is no basis for federal jurisdiction.

You just heard more argument than you wanted to hear on the issue of remand, but, Your Honor, when you consider those arguments and you consider the on-point precedent from the Fourth Circuit, the on-point precedent from all the other district courts within the Fourth Circuit that have dealt with these identical issues, the on-point precedent of a case out of the District Court of New Hampshire decided by Judge Barbadoro about a year ago that utterly rejected this Class Action Fairness Argument they've come up with a year ago, and they're still making the argument to you today.

Your Honor, when you consider those things,

you will see that there is no basis for federal jurisdiction, and that should be your primary inquiry. I realize it requires ignoring this enticing prospect that they want to hold out that because there is going to be just a short delay, this won't harm the City of Alexandria, but, Your Honor, that is utterly false.

So I don't want to belabor. I do think it's important, though. While I mentioned that New Hampshire case to point out -- Your Honor may know Judge Barbadoro, I do not. However, in the course of that case, he also dealt with and denied a motion to stay. And in doing so he talked about his experience both as a transferor and transferee MDL judge. And, importantly, he talked about the fact that he had sat on the Judicial Panel of Multidistrict Litigation and he endorsed the view that we suggest is the proper one that transferee courts -- MDL transferee courts and the JPML welcome the intervention of the transferor district court on issues like remand.

And, Your Honor, we only have to look to

events of earlier this week to know that that's the case here. On Monday, Judge Polster in the MDL has decided only four motions to remand. None involved cases like ours. None involved local government plaintiffs. Two were tribal cases, cases where Native American tribes had made claims against the opioid industry; and Judge Polster dispensed with the removal issues in that case under the federal officer basis for removal and, in fact, in that case denied motions to remand.

Two other cases, both of them brought by state attorney generals, one on behalf of the State of Montana, one on behalf of the State of Kentucky, those are not the kind of cases we're talking about here that are sitting there backlogged on the shelf.

THE COURT: I understand.

MR. SPIVEY: But here is the important thing that happened on Monday, he decided the State of Kentucky's case and he wrote a very short opinion. And you know what he relied on, he relied on other district court cases that had refused to stay their proceedings and had denied motions to

remand -- I'm sorry, granted motions to remand.

He granted the State of Kentucky's and the State of Montana's motion to remand, and in doing so he was glad to have the precedent of other District Courts to base his opinion on. So that's a false premise here, Your Honor.

The -- the -- the need --

THE COURT: Well, if he's doing it, maybe he ought to do this one.

MR. SPIVEY: But, Your Honor, here's the situation -- that's why I say --

THE COURT: I know what you're going to say and, just because I work quick, I'm not sure that makes the difference. Just because I give you a quick decision, I'm not sure that I buy that the City of Alexandria needs a quick decision or it's going to be harmed with a delayed decision, but I -- I understand what you're telling me.

Let me -- let me hear the man -- I mixed it up a little while ago. I think we've belabored it long enough. I didn't come out prepared to give you a decision here this morning and I'm not going to do

it. I'm going to take a look -- a further look at this and you'll get a decision from me pretty promptly.

MR. SPIVEY: I appreciate that, Your Honor. And I do appreciate the dispatch with which we've gotten here.

Outside the front door of this courthouse it says what is our mantra, and this is a prototypical example of it, justice delayed here is justice denied. That doesn't mean you need to rule from the bench today and I'm not asking you to and I welcome your deliberate review of the papers because I think you'll see there's no basis for federal jurisdiction here and so that -- that's our fundamental point.

THE COURT: All right. Is there anything else you want to tell me now?

MR. MENCHEL: Briefly, if I may. Your Honor, what the plaintiff wants in terms of where they file a lawsuit, I think Your Honor knows, is not the dispositive issue. When you file what is, in fact, in all but name a class action, it gets

removed under CAFA. When you file a case that implicates interstate questions of federal law, it gets removed to the federal courts because it implicates important federal questions.

Despite what my colleague has said, the CAFA issue that's been argued here today has not been argued anywhere else and resolved yet in this country. Okay. It will be a decision of first impression. It ought to be resolved by Judge Polster because there are similarly situated plaintiffs with the same motion pending before him. Judicial economy and uniformity of rulings weighs in favor of letting Judge Polster do this.

Also real quickly, in the -- this argument that they're going to be irreparably harmed by joining 15- or 1,600 other cases that allege the exact same thing was squarely rejected in the Northern -- in the District Court in the Northern District of Oklahoma in the Board of County Commissioners of Pawnee County versus Purdue Pharma. Exact same argument they made there and this is what the Court said, quote, The plaintiff argues that it

will be irreparably harmed by a transfer to the MDL because, quote, Judge Polster in the MDL has held that he will not act on any motions to remand and placed a moratorium on filing such motions. Exactly the same argument that he just made.

However, at a hearing on December 13th, 2017, Judge Polster expressed his preference for, quote, a framework that would allow consistent resolution of remand motions. But the Court goes on to note a preliminary assessment of the jurisdictional issues in this case suggest that they are not straightforward. Moreover, similar issues have already arisen in cases that have been transferred to the MDL. The Court allowed the stay and allowed the case to be transferred into the MDL, and a hundred other Courts have done the same thing for the same reason.

We think it's in the interest of judicial economy and uniformity that you should transfer the -- defer the ruling and allow the transfer to go forward.

Thank you, Your Honor.

THE COURT: All right. I'll take a look at this and get you all an answer as quickly as I can.

MR. SPIVEY: Thank you, Your Honor.

MR. JORDAN: Thank you, Your Honor.

THE COURT: All right. We'll adjourn until Monday morning at 9:30.

(Whereupon, the proceedings at 11:54 a.m. were concluded.)

COMMONWEALTH OF VIRGINIA AT LARGE, to wit:

I, REBECCA MONROE, Court Reporter and Notary Public in and for the Commonwealth of Virginia at Large, and whose commission expires August 31, 2021, do certify that the foregoing is a true, correct, and full transcript of the proceedings.

I further certify that I am neither related to nor associated with any counsel or party to the proceedings; nor otherwise interested in the event thereof.

_____

Rebecca Monroe

Notary Public

Commonwealth of Virginia at Large

Notary No. 7243327

WORD INDEX